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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 DAVID MCKEW,

13 Plaintiff,

14 v.

15 SAN FRANCISCO MUNICIPAL
RAILWAY, UNITED STATES POSTAL
16 SERVICE, MELVIN WASHINGTON,

17 Defendants.
18

Case No. 07-3620 EDL

**STIPULATION AND PROPOSED
ORDER**

19 THE PARTIES TO THIS MATTER HEREBY STIPULATE AS FOLLOWS:
20

- 21 1. Pending before the Court is a motion to dismiss ("the Motion") without prejudice,
22 filed by the defendant United States Postal Service for failure to exhaust
23 administrative remedies before filing suit.
- 24 2. The parties request that the Court grant the Motion without prejudice. See, e.g.,
25 Jerves v. U.S., 966 F.2d 517, 521 (9th Cir. 1992) ("Section 2675(a) establishes
26 explicit prerequisites to the filing of suit against the Government in district court. It
27 admits of no exceptions."); Burns v. United States, 764 F.2d 722, 723 (9th Cir. 1985)
28 ("The claim requirement of section 2675 is jurisdictional in nature and may not be

waived.”); Spawr v. United States, 796 F.2d 279, 280 (9th Cir. 1986) (“28 U.S.C. § 2675(a) specifies that a suit may not be instituted against the United States unless it is first presented to the appropriate federal agency and either finally denied or permitted to languish for six months without resolution. This claim requirement is jurisdictional in nature and may not be waived.”)

3. The parties further request that the Court remand the remaining claims and parties to the San Francisco Superior Court, pursuant to 28 U.S.C. section 1447(c) states, in pertinent part: “If at any time before final judgment it appears that the district court lacks subject-matter jurisdiction, the case shall be remanded.” See Page v. City of Southfield, 45 F.3d 128, 133 (6th Cir. 1995); In re Allstate Ins. Co., 8 F.3d 219, 233 (5th Cir. 1993).

SO STIPULATED.

DATED: October 19, 2007

KERN, NODA, DEVINE & SEGAL

/s/
Phillip A. Segal, Esq.
ATTORNEYS FOR PLAINTIFF

DATED: October 17, 2007

SAN FRANCISCO CITY ATTORNEY’S OFFICE

/s/
David Newdorf, Esq.
Deputy City Attorney
ATTORNEYS FOR DEFENDANTS MUNICIPAL
RAILWAY

DATED: October 19, 2007

UNITED STATES ATTORNEY’S OFFICE

/s/
Jonathan U. Lee
Assistant United States Attorney
ATTORNEYS FOR UNITED STATES POSTAL
SERVICE

PROPOSED ORDER

IT IS SO ORDERED.

The United States Postal Service's motion to dismiss is granted without prejudice. The remaining claims and parties are remanded to the Superior Court in and for San Francisco County.

November 27,
Date: ~~October~~ ___, 2007

Elizabeth D. Laporte
UNITED STATES DISTRICT COURT

